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NO.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

B. F. DIAMOND CONSTRUCTION COMPANY
AND
FIDELITY AND CASUALTY COMPANY
OF NEW YORK

Petitioners,

vs.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR &
ELIZABETH BROWNING,
Widow of Joseph D. Browning,

Respondents,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Eleventh Circuit

Brief of Petitioners

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QUESTIONS PRESENTED

1. Whether a bridge construction superintendent or rig foreman while standing or highlighting engineering marks upon a bridge footing permanently affixed to a river bed and crushed by a falling group of reinforcing rods mounted upon an adjacent footing,

(a) has such a realistically significant relationship to maritime activity or

(b) was then engaged in "longshoring operations" to afford coverage under the Longshoremens and Harbor Workers Compensation Act.

2. Whether, in a claim filed under the Longshoremens and Harbor Workers Compensation Act, the United States Court of Appeals for the Eleventh Circuit can find as a fact that an employer is engaged in "longshoring operations" or that a death occurred upon a covered situs when such has not been found, or considered, below and no facts in the record support such a finding.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, the parties to the proceeding below and those at interest therewith in the matter are as follows:

1. Elizabeth F. Browning, Widow
   Atwood Alan Browning, Son
   Debra Lynn Browning, Daughter
   of Joseph D. Browning, deceased,
   Claimants-Respondents

2. Richard J. Harris, Attorney for Claimants-Respondents

3. B. F. Diamond Construction Company and Hardaway Construction Company, Employer and Parent Company, Employer-Petitioner

4. Continental Insurance Company as parent of Fidelity and Casualty Company of New York, Carrier-Petitioner

5. Director, Office of Workers' Compensation Programs, a Respondent below.

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IN THE
SUPREME COURT
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B. F. DIAMOND CONSTRUCTION COMPANY
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Petitioners,

vs.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR &
ELIZABETH BROWNING,
Widow of Joseph D. Browning,

Respondents,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Eleventh Circuit

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion rendered by the United States Court of Appeals for the Eleventh Circuit, in the captioned matter on May 17, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit in the captioned matter is reported at 676 F.2d 547, (1982), and is reprinted as Appendix A hereto, *infra.* p. A-1.

The opinion of the Benefits Review Board (United States Department of Labor) is reported at 14 BRBS 313 and is reprinted as Appendix B hereto, *infra,* p. B-1 and the opinion of the Administrative Law Judge is reprinted as Appendix C, *infra,* p. C-1.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was rendered on May 17, 1982. The jurisdiction of this Court is invoked under 28 USCA §1254(1).

STATUTE INVOLVED

The relevent portions of the Longshoremens and Harbor Workers' Compensation Act, as amended, are as follows:

33 U.S.C. §902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker.

33 U.S.C. §902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §903:
(a) Compensation shall be payable under this Act in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §921:
(b) (3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's order shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole...

(4) (c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred. *** Upon such filing, the court shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board ***.

STATEMENT OF THE CASE

B. F. Diamond Construction Company, a bridge building company,[1] was building an interstate highway bridge across

[1] Though this company in the past had done marine construction work, the employee had only done bridge construction work for the past five years. Approximately one year before this accident, Diamond had been purchased by another company and had done bridge construction projects exclusively.

the Choctawhatchee Bay in Okaloose County, Florida. As the Administrative Law Judge found:

> At the time of the accident, the employee was standing on top of a "footing" consisting of precast piles driven into the riverbed and capped with a small concrete platform. A cage formed by steel reinforcing rods and used to strengthen the concrete columns which would ultimately connect the footing to the superstructure bridge fell on top of the employee, crushing him to death. [C-2]

The next activity would have been to put concrete molds or forms around the cages. These would hold the concrete in place until it was set. The record does not disclose when those metal forms would be put in place or if the employee would have participated in that work.

The Administrative Law Judge concluded that the employee-decedent was not engaged in longshoring operations, [C-3] a harbor worker, or a person engaged in maritime employment.[2] [C-4]

The Benefits Review Board said in part:

> Since there was no eyewitness to the accident, the record does not establish exactly what activity the employee was engaged in at the time of death. [B-2]

The Board, one member dissenting, affirmed the ruling below. [B-1 et seq]

The Court of Appeals, by its decision "found" that B. F. Diamond was engaged in "various maritime construction projects"; [A-3] and that "at the time of his injury, [Browning] was involved with the unloading of the metal forms from a barge moored in navigable waters". [A-5]

The only support for the Court of Appeals finding of fact is a wishful statement by the claimant's counsel

> I think the evidence will show if we were able to produce this live testimony that the time - or could at

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[2] Your petitioner argued before the ALJ that this injury did not occur on a covered situs as defined by the Act before the 1972 Amendments. The Administrative Law Judge never reached that point [C-4] The Board said "we do not reach the situs issue raised by the claimant." [B-6] The court of appeals, *sua sponte*, ruled he was upon a covered situs [A-6] and suggested such ruling was "not disputed" [A-6] – though it clearly was.

least look and see what these people know - that at the time of the accident he was involved in directing the operations of this crane operator and in moving the steel forms into place ***. But in the process, if you will, of unloading these forms from the barge and loading them on top of this concrete platform for - part of this job. [A-5]

From this statement of counsel, the Court of Appeals held:

> The conclusion that Browning was engaged in longshoring activities cannot be avoided. It is enough that Browning was "directly involved" with the unloading of a vessel at the time of his injury. [Citation omitted.] Therefore we conclude that Browning was an employee within the terms of the Act. [A-5]

The Court of Appeals also held

> And though the issue of whether Browning was injured while on "navigable waters" was not explicitly decided by ALJ or the Review Board, no real question is raised on this point. [A-6][3]

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3 As we indicated previosly, in n. 2, this is simply not true.

REASONS FOR GRANTING THE WRIT

1.

The decision below conflicts with the holding of the Court in *Northeast Marine Terminal Co. vs. Caputo,* 432 U.S. 249 (1977) as the Eleventh Circuit said the claimant can meet the status test by showing "Browning was 'directly involved' with the unloading of a vessel at the time of his injury" [A-5] whereas the Court had previously held it was "the obvious desire (of Congress) to cover longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation'. The theory does not comport with the Act's focus on occupations and its desire for uniformity." 432 U.S. at 276.[4]

2.

The decision below conflicts with the Court's decision in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977) in that it does not involve the trade-off of ship owners, stevedores, and workers mentioned in 432 U.S. at 261; Browning is not one within the "affirmatively (described) Class of workers Congress desired to compensate." 432 U.S. at 264; he is not in one of those "occupations - longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker" to which it was desired "to provide continuous coverage throughout their employment". 432 U.S. at 273.

3.

The decision below conflicts with the Court's holding in *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 82 (1979) wherein the Court said

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4 The BRB in *Hemminger v. Newport News Shipbuilding and Dry Dock Co.,* 13 BRBS 1099, 1101 (1981) records that the Director, OWCP, agreed the "moment of the injury" test is not proper for determining "status" under the Act. The Board reaffirmed that view. *Hemminger* demonstrates, too, the consistent holding of the Board that the "moment of injury" test is improper.

> We believe that §2(3)'s explicit use of the terms "longshoreman" and "other person engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act.

Yet below Browning was a land-construction worker and the record contains no evidence that he was engaged in cargo handling.

4.

There is a conflict with the Ninth Circuit case of *Weyerhaeuser v. Gilmore,* 528 F.2d 957 (9 Cir. 1975) cert. denied. 429 U.S. 868 (1976). The event with which we are concerned in this case is a builder upon a bridge footing permanently affixed to a riverbed. *Gilmore* held that those persons intended to be covered were *"persons customarily considered to be working in the business"*, [Emphasis by the Court] 528 F.2d at 960. Further:

> The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of this employment; i.e., the perils of the sea ***. Accordingly we believe that to be entitled to the benefits of LHCA, and employee's employment to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of "maritime employment" is nullified and rendered to read "any employment."

528 F. 2d at 961.

5.

There is a direct conflict between the decision below and that of the Second Circuit in *Fusco v. Perini North River Associates,* 622 F. 2d 1111 (2 Cir. 1980) cert. denied. 101 S. Ct. 959 (1981). The Second Circuit held, in the *Sullivan* case, that handling construction materials was "not performing

operations which longshoremen perform." 622 F. 2d at 1113. In the instant case, the records fails to reveal any handling of material by lifting or moving devices, but rather, only an anticipated setting in place of reusable concrete forms by someone.

6.

The decision below conflicts with the Second Circuit case of *Churchill v. Perini North River Associates,* 622 F. 2d 255 (2 Cir. 1981). Like *Fusco, Churchill* arose out of a sewer construction project in the North River. Churchill was unloading caisson from a barge upon which he was standing when injured. The Second Circuit, following the rule of *Ford,* supra, denied coverage explicitly holding injuries upon the water are not, *ipse dixit,* covered, and such work was not "longshoring operations".

7.

This case involves a substantial question of statutory construction in the administration of the Longshore Act. Despite the clear intent of the Congress to cover those "persons customarily considered to be in the business" [118 Cong. Rec. 36385, Part 27 (1972)] there is rampant confusion and uncertainty with respect to those persons who were, 1) injured while in the vicinity of "navigable waters" covered under the pre-amended Act and 2)allegedly about to do work which may bear some similarities to that which "maritime employment" workers do.

8.

The importance of the question cannot be underscored too severely. The Court, in *Caputo* and *Ford,* has addressed "status" in terms of traditional maritime work. The question of the "miscellaneous" workers who were covered under the pre-amended Act simploy because they were injured upon the navigable water has not been addressed by this Court.

It is perhaps reasonable to categorically state that in every case before the Benefits Review Board where this matter has been broached, as in the case below, it has been the opinion of one member of the board that all injuries covered by the pre-amendment Act are covered in the amended Act. That has been the consistent position of the Department of Labor. Yet the majority of the Board, as in this case, has consistently ruled that bridge construction is not covered by the Act. See *Nold v. Guy F. Adkinson Co.*, 9 BRBS 620 (1979) and *Hemminger v. Newport News Shipbuilding and Dry Dock Co., supra.* It has held that "it is clear that injury over navigable waters in and of itself is an insufficient benchmark by which to ascertain maritime employment." *Neely v. Pittson Stevedoring Corp.*, 12 BRBS 859, 860 (1980) and cases cited therein. *LeMelle v. B. F. Diamond Const. Co.*, 13 BRBS 542 (1931).[5]

9.

Browning, if allowed to stand, eliminates the dual "status" and "situs" tests of the 1972 Amendments -- and it goes further. Before those Amendments the test was simply if the injury occurred "upon" the navigable waters, including "upon" a waterbourne object. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

The case below holds that an injury occurring upon a man-made "island" permanently affixed to the land is covered --simply that, and nothing else, because Browning is believed to have been "highlighting" engineering marks at the time of death. It is suggested he would in the future, handle tools (set reusable concrete forms) -- but never handle cargo[6]

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5 Reversed. 674 F.2d 296 (4 Cir. 1982)

6 *Webster's Collegiate Dictionary*, Second Edition, 1946, p. 153, defines cargo as "the lading or freight of a ship or other vessel; load; freight. - Syn. See freight." *Ballentine's Law Dictionary*, Third Edition (1969) p. 175, defines cargo as "the load or lading of a ship or other vessel, having no more than a transitory connection with the vessel, the intent being to unload it at the destination or port of call of the vessel." The same work, at p. 1216 defines a

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The decision below conflicts with the Fifth Circuit in the case of *Avondale Shipyards, Inc. vs. Vinson,* 623 F.2d 1117, n. 1, (5th Cir. 1980). The Fifth Circuit held that the sole function of the court of Appeals "is to correct errors of law and to determine if the BRB *** deferred to the ALJ's fact-finding or has it undertaken de novo review and substituted its views for the ALJ's. *Presley v. Tinsley Maintenance Service,* 529 F.2d 433 (5 Cir. 1976). Yet below, the Eleventh Circuit has disregarded the findings of fact of the ALJ and the Board and substituted other findings unwarranted by the evidence and based solely, if anything, upon remarks of counsel of what he would like to have shown.

11.

The decision below conflicts with the tenor of the holding of the Court in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers Compensation Programs, et al.* _____ U.S. _____, 71 L.Ed. 2d 495 (1982) where this Court held that the District of Columbia's Circuit Court could not remand a case to require the ALJ find an injury where none existed. The court below, without remand, found for itself that the employee decedent was engaged in "longshoring operations" when no testimony existed for that finding.

12.

The decision conflicts with *Perkins v. Marine Terminals Corp.,* 673 F.2d 1097 (9th Cir. 1982) by finding facts on ques-

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"stevedore" as "one who works in the loading and unloading of ships." The *Oxford Universal Dictionary,* Third Edition, (1955) p. 2017, defines stevedore as "a workman employed either as overseer or laborer in loading or unloading the cargoes of merchant vessels." *Webster, op. cit.,* p. 976 defines stevedore as "one who works at, or is responsible for, the unloading and loading of a vessel in port." Also it shows a longshoreman, *ibid,* at 591, as "a laborer, as a stevedore or loader, who works about the wharfs of a seaport." *Ballentine, op cit.* p. 754, for its definition of longshoremen says "See stevedores."

tions not considered by the Administrative Law Judge or the Review Board. But the Ninth Circuit expressly refused to do so. "[W]e decline to reach this (notice) issue without benefit of the Board's prior reasoning." 673 F.2d at 1105.

CONCLUSION

In view of the conflict of the decision below with the prior decisions of the Court and with the contemporaneous decisions of the Courts of Appeals for the Second and Ninth Circuits and particularly to resolve authoritatively the status to which the Longshoremen's Act Amendments of 1972 affect those not within a maritime employment, Petitioners respectfully pray that the Court grant a writ of certiorari and reverse the decision of the court below.

Because the court below has considered questions not heretofore considered and found facts not previously found and for which there was no support within the record, Petitioners respectfully pray that the Court grant a writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

JOHN E. HOUSER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Supreme Court have been furnished by United States prepaid first class mail, on this 28 day of June, 1982, to the following:

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ELIZABETH BROWNING,
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Petitioner-Appellant,

v.

B. F. DIAMOND CONSTRUCTION COMPANY,
U. S. Fidelity and Casualty Company of New York,
and Director, Office of Workers' Compensation
Programs, United States Department of Labor,
Respondents-Appellees.

No. 81-5656.

United States Court of Appeals
Eleventh Circuit.

May 17, 1982.

Claimant appealed from decision entered by the Benefits Review Board refusing to award benefits under Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Arnold, Circuit Judge, sitting by designation, held that rig foreman in charge of operation of crane barge was engaged in "longshoring operations" where foreman, at time of injury, was involved with unloading of metal forms from barge moored in navigable waters, and thus the foreman was covered "employee" for purposes of Longshoremen's and Harbor Workers' Compensation Act.

Reversed and remanded.

1. Workers' Compensation — 262

Under Longshoremen's and Harbor Worker's Compensation Act, employee status can be based upon maritime nature of employment as whole or upon maritime nature of claimant's activity at time of injury. Longshoremen's and Harbor Workers' Compensation Act, §2(3) as amended 33 U.S. C.A. §902(3).

*Honorable Richard S. Arnold, U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

2. Workers' Compensation — 262

Rig foreman in charge of operation of crane barge was engaged in "longshoring operations" where foreman, at time of injury, was involved with unloading of metal forms from barge moored in navigable waters, and thus the foreman was covered "employee" for purposes of Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S. C.A. § 902(3).

See Publication Words and Phrases for other judicial constructions and definitions.

On Petition for Review of an Order of the Benefits Review Board.

Before FAY, VANCE and ARNOLD*, Circuit Judges.

ARNOLD, Circuit Judge:

This is a petition for review of a decision of the Benefits Review Board denying claimant, Mrs. Elizabeth Browning, widow of Joseph D. Browning, benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* The issue is whether Mr. Browning was a covered employee under 33 U.S.C. § 903(a). The Board determined that he was not, and we now reverse.

Browning was killed while employed as a rig foreman in charge of operation of a crane barge. Mrs. Browning made a claim for benefits which was initially denied by an administrative law judge (ALJ). Then the Benefits Review Board of the Department of Labor affirmed the denial of benefits (with one judge dissenting), finding that Browning was not a covered employee within the meaning of the Act. The Board's specific holding, which we now reverse, was that Mr. Browning was not engaged in "longshoring operations" under § 2(3) of the Act, 33 U.S.C. § 902(3).

I

Browning was employed by B. F. Diamond Construction Company, a company engaged in various maritime construction projects along the Atlantic and Gulf coasts. He was working as a rig foreman in the construction of a bridge that was to span the waters of the Gulf of Mexico and the Choctawhatchee Bay in Okaloosa County, Florida.

Browning was supervising a crane barge and an adjacent "steel barge" which held metal forms and other construction materials. The crane barge was used to set the metal forms in place around "cages" made of steel reinforcement rods. These steps were in preparation for the pouring of concrete within the forms to construct the bridge columns. Of course, an integral part of this process was the unloading of the steel forms and other materials from the steel barge. All this activity took place in about twenty feet of water some 500 to 600 feet from shore.

The ALJ found, and it is not disputed, that on August 24, 1978, at the time of the fatal mishap, Browning was standing atop a "footing" made up of pre-cast piles driven into the riverbed. There were no eyewitnesses to the incident, but Browning was found later crushed to death by one of the "cages," which apparently broke loose and fell on him. As for Browning's activity at this time, there was testimony that he was highlighting certain engineering marks with spray paint to facilitate the process of setting the metal forms around the "cages."

II.

[1] These facts are not in dispute. What is disputed is the proper legal conclusion to be drawn about Browning's status as an employee under the Act. Essentially, one is an "employee" if one is "engaged in maritime employement." 33 U.S.C. §902(3).[1]

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1 Section 2(3) of the Act, 33 U.S.C. § 902(3), reads:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

This employee status can be based upon the maritime nature of the employment as a whole or upon the maritime nature of the claimant's activity at the time of the injury. *Hullinghorst Industries, Inc. v. Carroll,* 650 F.2d, 754 (5th Cir. 1981), *cert. denied,* _____ U.S. _____, 102 S.Ct. 1037, 71L.Ed.2d _____ (1982); *Thibodaux v. Atlantic Richfield Co.,* 580 F.2d 841, 844 (5th Cir. 1978), *cert. denied,* 442 U.S. 909, 99 S.Ct. 2820. 61 L.Ed.2d 274 (1979).

[2] Petitioner argues that Browning was engaged in maritime activity at the time of his injury and therefore was within the Act's coverage.[2] She cites *Gilliam v. Wiley N. Jackson Co., 659 F.2d 54 (5th Cir. 1981* which she contends cannot be distinquished from the case at bar. In that case the claimant Gilliam worked for a construction company primarily engaged in bridge building and road grading. While supervising and assisting the unloading of construction materials from a barge to the shore, Gilliam was struck in the head by crane cables that were to be attached to the materials being unloaded.

The Gilliam court thought it clear that "Gilliam was performing longshoring activities at the time he was injured." *Id.* at 57. This conclusion was based on a reading of *Northeast Marine Terminal Co., v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), and the legislative history of the Act which describe " 'traditional' longshoring activities...in terms of 'unloading a vessel' and 'handling cargo.' " *Gilliam, supra,* 659 F.2d at 57, quoting *Northeast Marine, supra,* 432 U.S. at 267, 97 S.Ct. at 2359. The court went on to say:

Gilliam was unloading the piling from the barge when he was injured. Therefore, Gilliam was unloading cargo from a vessel

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2 Petitioner, joined by respondent Director of the Office of Workers' Compensation Programs, makes two other arguments for reversal of the Board's decision: first, that Browning's employment, viewed as a whole, was maritime in nature; and second, that the 1972 Amendments to the Act were not intended by Congress to withdraw coverage of employees previously within the protection of the Act. Because Browning would have been entitled to coverage under the pre-1972 Act by reason of his injury upon navigable waters, they argue that he should now be covered without regard to the nature of his activities at the time of the injury. See *Churchill v. Perini North River Associates,* 652 F.2d 255 (2d Cir. 1981), *cert. granted,* — U.S. —, 102 S.Ct. 1425, 71 L.Ed.2d — (1982). Because we agree with petitioners argument that Browning was engaged in maritime activities at the time of his injury, it is unnecessary for us to address these additional arguments.

and, hence, was engaging in longshoring activities at the time he was injured. It is that simple.

Gilliam, supra, 659 F.2d at 58 (footnote omitted).

Given this precedent we consider the case at bar to be just as simple. Browning, at the time of his injury, was involved with the unloading of the metal forms from a barge moored in navigable waters. On this point the record is clear, as the following exchange between the ALJ and claimant's counsel demonstrates:

ALJ: Well, isn't the testimony that he was the—either the rig foreman, I believe, was the title or designation given to him, that he was in charge of, of the crane operator on this barge, his responsibilities were the, to see that the, this construction on this particular platform or pier was carried out according to the specifications. Isn't that, is there any dispute as to that?

CLAIMANT'S COUNSEL: No sir. There is no dispute as to that at all. In a general sense that is what his responsibilities are. I'm talking about specifically what was he doing at the time this accident took place.

I think the evidence will show if we were able to produce this live testimony that at the time—or could at least look and see what these people know—that at the time of the accident he was involved in directing the operations of this crane operator and in moving the steel forms into place.

ALJ: Well, is—

CLAIMANT'S COUNSEL: (Interrupting) But in the process, if you will, of unloading these forms from the barge and loading them on top of this concrete platform for—part of his job.

ALJ: Hasn't the record established, been established at this point, that that was a part of his job and a portion of his responsibilities?

CLAIMANT'S COUNSEL: Yes, sir.

Transcript of hearing before the ALJ, pp. 109—10. The conclusion that Browning was engaged in longshoring activities cannot be avoided. It is enough that Browning was "directly involved" with the unloading of a vessel at the time of his injury. *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 539—40 (5th

Cir. 1976), *aff'd sub nom. P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979). Therefore we conclude that Browning was an employee within the terms of the Act.

Two additional requirements must be met before a claimant is entitled to coverage: (1) the claimant's employer must qualify as an "employer" under 33 U.S.C. § 902(4), and (2) the injury must have occurred on "navigable waters" as defined by 33 U.S.C. § 903(a).

It is not disputed that Browning's employer, B. F. Diamond Construction Company, comes within the terms of § 902(4). And though the issue of whether Browning was injured while on "navigable waters" was not explicitly decided by the ALJ or the Review Board, no real question is raised on this point. Thus Browning was a covered employee within the terms of the Act.

Accordingly, we REVERSE the decision of the Benefits Review Board and REMAND this cause for further proceedings to consider the appropriate benefits to be awarded.

It is so ordered.

BRB No. 80-583

DECISION and ORDER

ELIZABETH BROWNING (Widow of
JOSEPH D. BROWNING)
Claimant-Petitioner

v.

B. F. DIAMOND CONSTRUCTION COMPANY
and
U.S. FIDELITY AND CASUALTY COMPANY
OF NEW YORK
Employer/Carrier-
Respondents

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR
Party-In-Interest

Appeal from the Decision and Order of John D. Henson, Administrative Law Judge, United States Department of Labor.

Richard J. Harris (Adam, Adams, Brennan & Gardner), Savannah, Georgia, for the claimant.

John E. Houser, Jacksonville, Florida, for the employer/carrier.

Janet R. Dunlop (T. Timothy Ryan, Jr., Solicitor of Labor; Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Smith, Chief Administrative Appeals Judge, MILLER* and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

*Dissent by MILLER, Administrative Appeals Judge, to follow.

This is an appeal by claimant from a Decision and Order (80-LHCA-335N) of Administrative Law Judge John D. Henson, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter, the Act). The appeal is from a denial of coverage under the Act. The issue on appeal is whether the decedent met the status test of Section 2(3) of the Act, 33 U.S.C. § 902(3).

The decedent worked for employer, B. F. Diamond Construction Company, which was involved in constructing a highway bridge, designed to span the navigable waters of the East Pass in Florida. The decedent was a rig foreman,[1] who was in charge of operation of a crane barge which was engaged in setting metal forms around "cages" of steel reinforcement rods in preparation for the pouring of concrete within the forms and around the cages to form the next stage of two of the bridge columns or piers, which were immediately adjacent to the barge. Decedent's work was done on both the barge and on the piers. *See* Hearing Transcript at 56, 61-65. On August 24, 1978, the decedent was killed. The administrative law judge found that at the time of the accident, the employee was standing on top of a "footing" consisting of pre-cast piles driven into the riverbed and capped with a small concrete platform. A cage fell upon the employee, crushing him to death. Since there were no eyewitnesses to the accident, the record does not establish exactly what activity the employee was engaged in at the time of death. *See* Hearing Transcipt at 59, 63, 82, 88.

The administrative law judge primarily confined discussion regarding the status issue to whether the employee was a "harbor worker" or a person engaged in maritime employment. He concluded that the employee did not fall within the definition of harbor worker enunciated in *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, BRB No. 76-451 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 100 S.Ct. 2960 (1980). The judge reasoned that a bridge designed to service land vehicles is different in nature and purpose from the facilities which typically service a harbor; accordingly, the employee was not engaged in harbor work within the meaning of Section 2(3).

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1 Claimant and the administrative law judge characterize the employee as a "rig foreman"; however, employer argues in a letter dated August 28, 1980, that the employee's actual job title was "superintendent." While a job classification may provide circumstantial evidence of the nature of an employee's duties, under the relevant case law, it is not dispositive of questions of status under the Act. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268, n.30 (1977); *White v. Newport News Shipbuilding and Dry Dock Co.*, 633 F.2d 1070, 1073, 12 BRBS 598, 604 (4th Cir. 1980).

The administrative law judge further held that the employee's activities did not constitute "maritime employment" as defined in *Sedmak v. Perini North River Associates*, 9 BRBS 378, BRB No. 77-896 *et al.* (1978), *aff'd sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3531 (U.S. Jan. 27, 1981) (No. 80-651).[2] Citing *Nold v. Guy F. Atkinson*, 9 BRBS 620, BRB Nos. 78-361/A (1979), the judge reasoned that a bridge is not an aid to navigation, and that bridge construction does not significantly contribute to commerce on navigable waters; thus, bridge construction is not "maritime employment." Finally, the administrative law judge concluded that it was clear from the record that the employee was not engaged in "longshoring operations."

Since the status test of coverage was not met, the administrative law judge denied death benefits. In so ruling, the judge commented that even a finding that the death occurred on a covered situs, as defined in Section 3(a) of the Act, would not overcome the jurisdictional defect with respect to status.

On appeal, claimant presents alternative theories of coverage under Section 2(3). She argues that, prior to the 1972 amendments to the Act, the decedent would have been covered regardless of the nature of his work since the death occurred over actual navigable waters. Since Congress did not intend, by virtue of the amendments, to exclude from coverage those persons previously entitled to benefits under the Act, coverage is established in this case. In the alternative, claimant contends that the employee was engaged in "longshoring operations" by virtue of his supervision of unloading activities at the bridge construction site.[3] Finally, claimant contends that the death occurred on a covered situs as defined by Section 3(a), *i.e.*, in an adjoining area customarily used by an employer for the unloading of a vessel.

---

[2] The Board majority therein concluded that "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." *Sedmak v. Perini North River Associates, supra*, 9 BRBS at 386.

[3] The Director, who also advocates reversal of the status ruling below, presents arguments substantially the same as those offered by claimant.

Preliminarily, we affirm the ruling below that the employee was not a "harbor worker" within the meaning of Section 2(3) of the Act and the relevant case law. In *Stewart v. Brown & Root, Inc., supra,* 7 BRBS at 365, we stated that the term "harbor worker" includes:

> At least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves, and adjacent areas used in the loading, unloading, repair or construction of ships).

Although the list of the enumerated facilities is not all inclusive, bridges do not come within the generic category of harbor facilities. We have previously held that bridge construction workers are not harbor workers within the meaning of Section 2(3). *Gilliam v. Wiley N. Jackson Co.,* 12 BRBS 556, BRB Nos. 79-388/A (1980); *Nold v. Guy J. Atkinson Co.,* 9 BRBS 620, BRB Nos. 78-361/A (1979).

We also affirm the determination below that decedent was not a maritime employee under Section 2(3). In *Sedmak, supra,* we concluded that "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). 9 BRBS at 386. In the instant case, the edifice under construction was a highway bridge, designed to span navigable waters. As such, it is an instrument of land transportation and not of maritime commerce. Accordingly, the activity in which the employee was engaged does not constitute maritime employment within the meaning of Section 2(3). *LeMelle v. B. F. Diamond Construction,* BRBS, BRB No. 79-640 (June 11, 1981); *Gilliam v. Wiley N. Jackson Co., supra; Nold, supra.*

Claimant also contends that the decedent was engaged in "longshoring operations" because he regularly marked the exact places on the bridge piers where the bases of the forms would be placed when unloaded by the barge crane operator. We disagree that this duty entitles decedent to coverage under the Act. The U.S. Court of Appeals for the Second Circuit re-

jected an analogous argument on reconsideration in *Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *petition for rehearing denied* No. 1377-9 (Aug. 19, 1980). The court held that claimant, who worked on a sewage construction project over navigable waters, was not engaged in longshoring operations.

> The evidence shows that his duties were exclusively in connection with the construction of a sewage disposal plant. When Sullivan unloaded a barge used in carrying construction materials from the shore to the point of construction, he was not performing operations which longshoremen perform. Longshoremen do not unload barges used in connection with construction of a structure which reaches from a point on shore to a point in the river.

See Churchill v. Perini North River Associates, 12 BRBS 929, 934, BRB Nos. 79-113/A *et al. (1980); Domenico v. Crimmins-Vacar Joint Venture*, 9 BRBS 668, BRB No. 77-593 (1979). Thus, in the instant case, we affirm the administrative law judge's holding that the decedent was not engaged in "longshoring operations."

Finally, we address the contention that injury over preamendment navigable waters is alone sufficient to establish coverage under the Act. The Supreme Court has twice expressed its conclusion that the amended Act contains a two-pronged jurisdictonal test which requires proof of status and situs coverage as defined in Sections 2(3) and 3(a). *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 332 (1979); *Northeast Marine Terminal Co., Inc., v. Caputo*, 432 U.S. 249, 264-265 (1977). We have previously held that injury over navigable waters in and of itself is an insufficient benchmark by which to ascertain maritime employment. *Sedmak v. Perini North River Associates*, 9 BRBS 378, BRB No. 77-896 *et al.* (1978), *aff'd sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3531 (U.S. Jan. 27,

1981) (No. 80-651).[4] Therefore, assuming *arguendo* that the decedent herein was injured over actual navigable waters, we hold that this is not alone sufficient to establish coverage. *Neely v. Pittson Stevedoring Corp.*, BRBS , BRB No. 79-381 (Oct. 31, 1980); *Gilliam v. Wiley N. Jackson Co.*, 12 BRBS 556, 557-558, BRB Nos. 79-388/A (1980).

We therefore affirm the denial of benefits below on the ground that the decedent did not meet the status requirement of Section 2(3) of the Act. We do not reach the situs issue raised by claimant.

SO ORDERED.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

I Concur:

ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 11th day
of June 1981

MILLER, Administrative Appeals Judge, dissenting:

I must dissent from my colleagues' determination that claimant was not engaged in employment covered by Section 2(3) of the Act. In implementing their restrictive view of coverage under the Act, my colleagues have denied coverage to a claimant clearly intended to be within the scope of the Act.

In giving consideration to this case, the Supreme Court's directives in one of the first cases presented under the Act must be kept in mind.

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4 In *Fusco, 622 F.2d 1111, upon reconsideration of an earlier decision in light of P. C. Pfeiffer Co., Inc. v. Ford, supra*, the Second Circuit reversed its prior ruling that "maritime employment" was to be geographically interpreted so as to include employees whose principal duties were performed on navigable waters. The court stated, "...we read the *[Ford]* opinion as precluding any application of the LHWCA, as amended in 1972, to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." 622 F.2d at 1113; 12 BRBS at 331.

> [The Act] requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. *[The Act is] deemed to be in the public interest and should be construed liberally in futherance of the purpose for which [it was] enacted and, if possible, so as to avoid incongruous or harsh results.* [Citation omitted.]

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932). See also Voris v. Eikel, 346 U.S. 328 (1953).

The United States Court of Appeals for the Fifth Circuit, the circuit in which this case arises, set forth guidelines in *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.,* 625 F.2d 1248 (5th Cir. 1980), *aff'g Hansen v. Oilfield Safety, Inc.,* 8 BRBS 835, BRB Nos. 78-304/A, *aff'd on reconsideration,* 9 BRBS 490 (1978), concerning the interpretation to be given coverage provisions of the Act. In considering the proper test to be used for determining questions of coverage, the Fifth Circuit looked to the Supreme Court's decision in *Northeast Marine Terminal Co. v. Caputo,* 6 BRBS 150, 432 U.S. 249 (1977). "In resolving whether employees satisfied the 'status' test of the [Act], the Supreme Court noted that the 1972 Amendments [to the Act] are broad and suggest taking an expansive view of coverage." *Oilfield Safety,* 625 F.2d at 1253.[1]

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[1] The language of the [1972] Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose' and in a way which avoids harsh and incongruous results. *Voris v. Eikel,* 346 U.S. 328, 333 (1953). *Northeast Marine Terminal Co. v. Caputo,* 6 BRBS 150, 161-62, 432 U.S. 249 (1977).

The Fifth Circuit then rejected the "right to control" test in determining the coverage issue of employee-employer relationship because it "tends to exclude, and thus is inappropriate for the [Act]." *Id.* It is clear, then, that tests of coverage, such as those for both the employee-employer relationship as well as for "status," should be inclusive.

My colleagues' test for coverage flies in the face of the directives of both the Supreme Court and the Fifth Circuit. Before reviewing the tests which should be applied in this case, I must note that my colleagues futher fail to provide claimant the benefit of the Section 20(a) presumption, 33 U.S.C. § 920(a) that "the claim comes within the provisions of this Act." While my colleagues would deny application of Section 20(a) to questions of coverage, as I pointed out in my dissenting opinions in *LeMelle v. B. F. Diamond Construction Co.*, BRBS , *BRB* No. 79-640 (June 11, 1981), and *Brown v. Hydro-Dredge Corp.*, BRBS , BRB Nos. 79-721/A (June 10, 1981), such an interpretation deprives claimant of the full panoply of protections provided to him by the Act. As I demonstrated in *LeMelle* and *Brown*, the Section 20(a) presumption does not apply to questions of statutory interpretation, but, once the test to be used has been determined, Section 20(a) applies to presume that claimant has met that test. The question presented, then, is whether *employer* has shown that claimant does not meet any of the tests for "status" under Section 2(3) of the Act.

As I stated in my dissenting opinions in *Churchill v. Perini North River Associates*, 12 BRBS 929, 935, BRB Nos. 79-113/A *et al.* (1980), *Gilliam v. Wiley N. Jackson Co.*, 12 BRBS 556, 559, BRB Nos. 79-388/A (1980), and *Sedmak v. Perini North River Associates*, 9 BRBS 378, 387, BRB Nos. 77-896 *et al.* (1978), the fact that claimant would have been covered under the Act prior to the 1972 amendments is dispositive of the issue of coverage subsequent to the 1972 amendments to the Act.[2] *See also* my

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2 In *P. C. Pfeiffer Co. v. Ford*, 11 BRBS 320, 444 U.S. 69 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 6 BRBS 150, 432 U.S. 249 (1977), the Supreme Court dealt solely with the question of whether those claimants were "the kind of *landbased* employees that Congress intended to encompass within the term 'maritime employment.'" *Ford* 11 BRBS at 327 (emphasis added).

dissenting opinions in *LeMelle; Brown.* Since employer has not established that claimant would not have been covered under the Act prior to the 1972 amendments, Section 20(a) controls the result.

Further, the record is clear that employer has not shown that claimant was not engaged in longshoring activity at least some of the time. *Northeast Marine Terminal Co. v. Caputo.*

Employer is a corporation engaged in projects on navigable waters. Employer primarily undertakes the construction of highway bridges, tunnels, and docks along the Atlantic and Gulf Coasts. *See* Hearing Transcript at 27-30, 84-86. In conjunction with his responsibilities as a foreman, claimant supervised the unloading of materials used in the bridge construction project. *See, e.g.,* Hearing Transcript at 62-63.

"Historically, the work of loading and unloading is the work of the ship's service, performed until recent times by the members of the crew." *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 96 (1946). No distinction was made between the cargo being unloaded for further shipment and the cargo being unloaded for the ultimate consumer: *all* loading and unloading was performed by members of the crew. Therefore, the test set forth in Weyerhaeuser Co. v. Gilmore, 3 BRBS 140, 528 F.2d 957 (9th Cir. 1976), could be applied to provide coverage to this claimant, because the *Weyerhaeuser Co.* test would be inclusive, and not exclusive, of this claimant, and employer has not submitted substantial evidence to show that the duties performed by claimant were not traditionally performed by the ship's service employees.

Even under my colleagues' test as expounded in *Sedmak,* claimant herein is covered under the Act. As my colleagues note, in *Sedmak* they required that

> a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3).

9 BRBS at 386 (emphasis added). Taking these words at face value, one would have to assume that "a claimant's employ-

ment," *i.e.*, the tasks and duties performed by claimant, must be scrutinized. However, the majority inexplicably interjects the employer's goals and functions, holding that these control the characterization of claimant's tasks and duties.

The Supreme Court opinions in *Northeast Marine Terminal Co. v. Caputo* and *P. C. Pfeiffer Co. v. Ford*, 11 BRBS 320, 444 U.S. 69 (1979), provide no support for my colleagues' misinterpretation of their own test. One searches in vain for any indication that the Supreme Court found employer's goals and functions to be dispositive of the issue of "status" of an employee under Section 2(3) of the Act. In fact, the scrutiny given by the Supreme Court in these cases focused upon the "tasks," *Northeast Marine Terminal Co.*, 3 BRBS at 164, 165, and "duties," *P. C. Pfeiffer Co.*, 11 BRBS at 327, of the claimants. The only requirement in the Act concerning the nature of the *employer's* "status" is that employer have "employees...employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 902(4).

For a legal test to be used in deciding a case, it must clearly present the factors which will be dispositive of the issues. Otherwise, the test becomes mere verbiage. If my colleagues' test is to be applied, then it must be given effect as presented. In providing that employer may establish that there is no "status" under the Act and rebut the Section 20(a) presumption by providing proof on the totally unrelated *and unexpected* issue of *employer's* status, my colleagues reduce their own test for status to surplusage and substitute a test which can only serve an *exclusive*, and not an *inclusive*, purpose.

Section 3(a) of the amended Act requires that an injury or death occur upon the navigable waters of the United States, including an "adjoining area customarily used by an employer in loading and unloading a vessel." In the instant case, the employee's supervision of the unloading of materials from a barge renders the employment site an "adjoining area" within the meaning of Section 3(a).

I would, therefore, hold that coverage has been established under Sections 2(3) and 3(a) of the Act and would reverse the decision of the administrative law judge.

Dated this 28th day of July 1981

JULIUS MILLER
Administrative Appeals Judge

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Hebert Federal Building
Room 909, 600 South Street
New Orleans, Louisiana 70130

In the Matter of

JOSEPH D. BROWNING (DECEASED)

Claimant

against

B. F. DIAMOND CONSTRUCTION CO.

Employer

and

U.S. FIDELITY & CASUALTY COMPANY
OF NEW YORK

Carrier

Case No. 80-LHCA-335N

OWCP No. 6-42613

C-2

DECISION AND ORDER

Statement of the Case

This is a claim for death benefits provided under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, *et seq.*, (hereinafter the Act), filed by Mrs. Elizabeth F. Browning, widow of Joseph D. Browning (hereinafter the Employee), and their son, Atwood Alan Browning, and their daughter, Debra Lynn Browning (hereinafter the Claimants), against B. F. Diamond Construction Company (hereinafter the Employer) and U.S. Fidelity & Casualty Company of New York (hereinafter the Carrier). The claim arises as a result of the death of the employee on August 24, 1978.

A hearing was scheduled and held on January 17, 1980, at Savannah, Georgia, at which time the parties were represented by counsel and afforded full opportunity to present documentary evidence, examine and cross-examine witnesses and to make oral arguments. Post-hearing briefs were subsequently submitted by the parties and associated with the record. This decision and order is rendered based on an evaluation of the entire record.

Findings of Fact and Conclusions of Law

On August 24, 1978, the above-named employee was killed during the course of his employment as a rig foreman for B. F. Diamond Construction Company which was engaged in the construction of a highway bridge spanning the navigable waters of the East Pass, just west of Destin, Florida. At the time of the accident, the employee was standing on top of a "footing" consisting of precast piles driven into the riverbed and capped with a small concrete platform. A cage formed by steel reinforcement rods and used to strengthen the concrete columns which would ultimately connect the footing to the superstructure of the bridge fell on top of the employee, crushing him to death. The parties have agreed that the average weekly wage of the employee was $500.00 per week.

The primary issue for determination is whether or not this injury resulting in death is covered by the Longshoremen's and Harbor Worker's Compensation Act. More specifically, it must be resolved whether the employee meets the two-tiered "status" and "situs" tests of being engaged in maritime employment over navigable waters of the United States. *P. C. Pfeiffer Co., Inc. v. Ford,* 100 S.Ct. 328 (1979); *Northwest Marine Terminal Co., Inc. v. Caputo,* 342 U.S. 249 (1977).

With respect to the issue of "status", Section 2(3) of the Act provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons met.

It is clear from the record that the employee was neither a longshoreman or engaged in longshoring operations, nor was he a ship repairman, a ship-breaker, or a shipbuilder. Therefore, to qualify for benefits under the Act, the Claimants would have to show that the employee was "a harbor worker" or "any person engaged in maritime employment."

The term "harbor worker" was defined by the Board in *Stewart v. Brown & Root, Inc.,* 7 BRBS 536 (1978), *aff'd sub nom. Brown & Root, Inc. v. Stewart,* 11 BRBS 86 (4th Cir. 1979) as embracing

> "Those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in loading, unloading, repair or construction of ships) . . ."

The employee in this case was not involved in the construction of harbor facilities, but in the building of a bridge designed to service land vehicles. Since such a structure is different both in nature and purpose from the typical facilities servicing a harbor,

it must be concluded that the employee was not a "harbor worker" as that term is defined in *Stewart.* Furthermore, the employee's activities do not meet the test for "maritime employment" as pronounced by the Board in *Sedmak v. Perini North River Associates,* 9 BRBS 378, BRB No. 77-896 (January 12, 1979), requiring that such employment exhibit a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." A bridge is not an aid to navigation nor does the construction of a bridge contribute in any significant way to commerce on navigable waters. See *Nold v. Guy F. Atkinson Co.,* 9 BRBS 620 (1979) (working on a barge to construct a bridge was not maritime employment).

Since the record clearly establishes that the employee fails to meet the status test for jurisdiction under Section 2(a) of the Act, death benefits pursuant to Section 9 of the Act must be denied. Even a finding that the death occurred on a covered situs as defined in Section 3(a) of the Act would not be sufficient to overcome the jurisdictional defect with respect to status. *See Thibodaux v. Atlantic Richfield Company,* 580 F.2d 841 (1978) (where the 5th Circuit Court of Appeals denied coverage under the Act upon a finding that the status requirement had not been met, despite the fact that the accident had occurred on a covered situs).

The request for professional fees pursuant to Section 28 of the Act filed by the Claimant's attorney must be denied since the claimant did not prevail in this cause.

ORDER

It is therefore ORDERED that the claims of Mrs. Elizabeth F. Browning, Atwood Alan Browning and Debra Lynn Browning, claimants, for death benefits under the provisions of Section 9 of the Act (33 U.S.C. § 909) and for the attorney fees under the provisions of Section 28 of the Act (33 U.S.C. § 933) are hereby DENIED.

Dated: April 29, 1980
New Orleans, Louisiana

JOHN D. HENSON
Administrative Law Judge

Office - Supreme Court, U.S.
FILED
AUG 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-4

In the Supreme Court of the United States

OCTOBER TERM, 1982

B.F. DIAMOND CONSTRUCTION COMPANY, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether a bridge construction worker who supervised the unloading of construction materials from a barge docked in navigable waters was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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Section 21(b)(3), 33 U.S.C. 921(b)(3) 3
Section 21(c), 33 U.S.C. 921(c) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-4

B.F. DIAMOND CONSTRUCTION COMPANY, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 676 F. 2d 547. The opinion of the Benefits Review Board (Pet. App. B-1 to B-11) is reported at 14 Ben. Rev. Bd Serv. (MB) 313. The decision and order of the administrative law judge (Pet. App. C-1 to C-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1982. The petition for a writ of certiorari was filed on July 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Elizabeth Browning is the widow of Joseph D. Browning, who was employed by petitioner B.F. Diamond Construction Company. Browning was killed on the job while helping to construct a highway bridge across navigable waters of the Gulf of Mexico and the Choctawhatchee Bay in Okaloosa County, Florida (Pet. App. A-3, B-2). The decedent was a rig foreman who, at the time of death, was in charge of the operation of a crane barge that was used to unload metal forms from a supply barge and set them around "cages" of steel reinforcement rods. Concrete would then be poured into the forms to construct bridge columns or piers (*id.* at A-3, B-2). The decedent's duties were performed on both the barge and the piers (*id.* at B-2) and took place in about 20 feet of water, 500-600 feet from shore (*id.* at A-3). At the time of his death, Browning was standing on top of a "footing," consisting of pre-cast piles driven into the riverbed, when a cage fell upon him. There were no eyewitnesses to the accident, but there was testimony that at the time of his death Browning may have been highlighting certain engineering marks with paint to facilitate the setting of metal forms around the cages (*id.* at A-3, B-2).

Mrs. Browning filed a claim for compensation for her husband's death under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* The administrative law judge denied the claim, holding that the decedent did not meet the "status" test of Section 2(3) of the Act, 33 U.S.C. 902(3). Specifically, the ALJ held that Browning "was neither a longshoreman or engaged in longshoring operations," nor was he a ship repairman, shipbreaker, or shipbuilder (Pet. App. C-3). "Therefore, to qualify for benefits under the Act, the Claimants would have to show that the employee was 'a harbor worker' or 'any person engaged in maritime employment,' " within the

meaning of Section 2(3) (Pet. App. C-3). The ALJ concluded that decedent was not a harborworker because a bridge "is different both in nature and purpose from the typical facilities servicing a harbor" (*ibid.*). The ALJ also concluded that bridge construction was not "maritime employment" under prior Benefits Review Board decisions that required a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (*id.* at C-4).

Mrs. Browning appealed to the Benefits Review Board pursuant to Section 21(b)(3) of the Act, 33 U.S.C. 921(b)(3). In a 2-1 decision, the Board ruled that the decedent was not covered by the Act, relying on its prior precedent that bridge builders are not "harborworkers" or otherwise engaged in "maritime employment" within the meaning of Section 2(3) (Pet. App. B-4). The Board also rejected the argument that the decedent was engaged in "longshoring operations" by virtue of his unloading metal forms from a supply barge. The Board relied on Second Circuit precedent that unloading supplies from barges during the course of marine construction work does not constitute "longshoring operations" (*id.* at B-4 to B-5). See *Fusco* v. *Perini North River Associates*, 622 F. 2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981).[1]

Mrs. Browning sought review of the Board's decision in the court of appeals pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as respondent and filed a brief in support of the petition for review. The court granted the petition and, relying on the Fifth Circuit's

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[1] Board Member Miller dissented, relying on his view that employees, who would have been covered prior to the 1972 amendments, are "engaged in maritime employment" within the meaning of the amended Act (Pet. App. B-8). Moreover, he believed that the decedent was covered by virtue of his supervision of the unloading of materials used in the bridge construction project (*id.* at B-9).

decision in *Gilliam* v. *Wiley N. Jackson Co.*, 659 F. 2d 54 (1981), petition for cert. pending, No. 81-1039 (filed Dec. 4, 1981), held that Browning was covered by virtue of his unloading duties. In *Gilliam*, the Fifth Circuit found that a worker who was injured while unloading pilings from a supply barge was "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3). The court here stated (Pet. App. A-5) that "Browning, at the time of his injury, was involved with the unloading of the metal forms from a barge moored in navigable waters" and therefore met the status test of Section 2(3).[2]

DISCUSSION

The court of appeals correctly resolved the LHWCA coverage issue in this case. The court correctly concluded that a bridge construction worker who supervised the unloading of materials from a barge was engaged in "maritime employment" within the meaning of Section 2(3) of the LHWCA. This ruling, however, conflicts with a recent decision of the Second Circuit that denies benefits to a marine construction worker who was injured on actual navigable waters while supervising the unloading of materials from a barge. *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (1981), cert. granted *sub nom. Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 81-897 (Feb. 22, 1982). Because of this conflict, we suggest that the Court hold this petition in abeyance, pending decision in the *Perini* case.

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[2]The court also concluded that Browning met the situs test of Section 3(a) of the Act, 33 U.S.C. 903(a). Although "the issue of whether Browning was injured while on 'navigable waters' was not explicitly decided by the ALJ or the Review Board, no real question is raised on this point" (Pet. App. A-6).

1. Browning's death is compensable under the Act for the reason expressed by the court of appeals: the decedent performed longshoring duties as a regular part of his bridge construction job. Section 2(3) describes a covered employee as "any person engaged in maritime employment, including any longshoreman *or other person engaged in longshoring operations* * * *" (33 U.S.C. 902(3); emphasis added). Contrary to petitioners' contention (Pet. 4-5, 10), it does not matter whether Browning was unloading metal forms from the barge at the moment of injury (Pet. App. A-5). This Court has specifically held that, under the 1972 amendments to the LHWCA, Congress "counted as 'longshoremen' persons who spend 'at least some of their time in indisputably longshoring operations.' " *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 75 (1979), quoting *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977). And, as the court of appeals noted, "employee status can be based upon the maritime nature of the employment as a whole or upon the nature of the claimant's activity at the time of the injury" (Pet. App. A-4). See *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F. 2d 750, 754 (5th Cir. 1981), cert. denied, No. 81-693 (Jan. 11, 1982). The critical fact here is that Browning regularly engaged in the traditional longshoring operation of unloading cargo from a vessel (Pet. App. A-3, A-5, B-2, B-4, B-9), thus falling squarely within the scope of the Act.[3]

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[3]The fact that the cargo Browning unloaded consisted of materials to be used in bridge building is irrelevant for coverage purposes. *Gilliam* v. *Wiley N. Jackson Co., supra*, 659 F. 2d at 58. The ultimate use of cargo is never relevant in determining whether one is engaged in longshoring. The important factor is that Browning was regularly engaged in the traditional longshoring job of unloading cargo from a vessel moored in navigable waters and was thus exposed to the traditional hazards of longshoring work that the LHWCA was designed to cover.

Petitioners also protest (Pet. 4 & n.2, 5 & n.3, 10) the court of appeals' conclusion that the situs requirement of Section 3(a) was met. Browning

2. Although the ruling below is correct, it conflicts with decisions of the Second Circuit that deny coverage to maritime construction workers working on actual navigable waters whose duties include the unloading of cargo from supply vessels.

In *Fusco* v. *Perini North River Associates, supra,* 622 F. 2d at 1112-1113, the Second Circuit denied coverage to two workers engaged in constructing a sewage treatment plant on actual navigable waters. The court specifically rejected (*id.* at 1113) the argument that a marine construction worker could be covered because his job included longshoring activities:

> When [the claimant] unloaded a barge used in carrying construction materials from the shore to the point of construction, he was not performing operations which longshoremen perform. Longshoremen do not unload barges used in connection with construction of a structure which reaches from a point on shore to a point in the river.

In *Churchill* v. *Perini North River Associates, supra,* the Second Circuit relied on its ruling in *Fusco* to deny coverage to another marine construction worker even though that worker was injured while he was on a barge in actual navigable waters. In addition to arguing that Churchill was covered because he would have been covered before the 1972 amendments extended coverage under the LHWCA, the Director argued that Churchill was covered because his

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was killed while on a "footing" consisting of a platform placed on the top of piles driven into the river bed but unconnected to shore, located about 500 feet from land, in approximately 20 feet of water. In these circumstances, the court correctly noted that "no real question is raised" as to whether Browning was injured on navigable waters, as defined under the amended Act (Pet. App. A-6). See generally *Trotti & Thompson* v. *Crawford,* 631 F. 2d 1214 (5th Cir. 1980).

duties at the time of injury included the unloading of caissons and other material from supply barges. The Second Circuit rejected these arguments, however, and denied coverage.

On February 22, 1982, this Court granted the Director's petition for a writ of certiorari in *Churchill* v. *Perini North River Associates, supra.* That case presents the question whether "a marine construction worker injured while working on actual navigable waters is 'engaged in maritime employment' within the meaning of Section 2(3) of the [LHWCA]" (81-897 Pet. Br. I). Because the resolution of that question will likely control or substantially influence the resolution of this case,[4] we believe that the Court should hold this petition in abeyance pending its decision in *Perini.*

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[4]If this Court holds in *Perini* that marine construction workers who are injured on actual navigable waters remain covered under the amended LHWCA, Browning would be entitled to benefits. The "footing" on which Browning was killed would have qualified as actual navigable water under the pre-1972 Act. See *Dixon* v. *Oosting,* 238 F. Supp. 25, 29 (E.D. Va. 1965). In any event, his job regularly required him to work on the water.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 81-897.

Respectfully submitted.

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